No. 08-

In the

Supreme Court of the United States

Yong Li,

Petitioner,

v.

Raytheon Company and others,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MASSACHUSETTS
SUPREME JUDICIAL COURT

Petition for Writ of Certiorari

Yong Li
32 Willow Road
Sudbury MA 01776
pro se petitioner

Dated: January 19, 2009

QUESTION PRESENTS

1. Whether *sua sponte* dismissal under Rule 12(b)(6) by appellate court violates the Due Process Clause.

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PETITION FOR A WRIT OF CERTIORARI

Yong Li hereby petitions for a writ of certiorari to review the judgment of the Massachusetts Supreme Judicial Court in Yong Li v. Raytheon Company and others[1], No. FAR-17039 (September 08, 2008).

OPNIONS BELOW

The panel opinion of the Massachusetts Appeal Court, dated March 25, 2007 (Appeal Court No. 2007-P-0156), 71 Mass. App. Ct. 1115 (Table, Text in Westlaw), Unpublished Rule 1:28 Disposition, 2008 WL 783404, is reproduced at Petition's Appendix page 4 ("Pet App 004"). The panel order of the Appeal Court, dated March 25, 2007, is reproduced at Pet App 003. The order of the Supreme Judicial Court denying the Application for Further Appellate Review, dated July 23, 2008, is reproduced at Pet App 012. The order of denying the motion for reconsideration, dated September 8, 2008 (the letter dated November 26, 2008), is reproduced at Pet App 013. The Order and the opinion (the transcript) of the Massachusetts Middlesex Superior Court, dated November 7, 2006, are reproduced at Pet App 001 and 002. The original complaint is reproduced at Pet App 014.

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[1] This petition only concerns the claims (Count I and Count II) against Raytheon and disregards other claims and defendants.

JURISDICTION

On May 11, 2006, the petitioner filed a complaint in the Massachusetts Middlesex Superior Court. In the complaint, the petitioner asserted, a race discrimination claim against her ex-employer Raytheon (Count I); a retaliation claim against Raytheon (Count II); and other state tort law claims against Raytheon and others. On October 11, 2006, the Superior Court dismissed the claims under Rule Mass. R. Civ. P. 12(b)(9) for a pending action in the federal court. The petitioner filed a timely Notice of Appeal. On March 25, 2008, the Massachusetts Appeals Court issued its decisions. The decisions ruled that the motion judge **erred** in dismissing the claims (Count I and Count II) against the respondent Raytheon. However, the panel did not remand the case back for retrial. Instead, the panel judge ruled a *sua sponte* dismissal under Mass. R. Civ. P. 12(b)(6) ("Rule 12(b)(6)") for failure to state a claim upon which relief can be granted, despite the issue of failure to state a claim upon which relief can be grounded had never been raised. There was no hearing, no opportunity to amend the complaint.

On June 30, 2008, the Appeal Court denied the petitioner's Petition for Rehearing, in which, the petitioner specifically indicated that the issue of Rule 12(b)(6) had never been raised.

Focusing on the *sua sponte* dismissal, the petitioner filed a timely Application for Further Appellate Review ("FAR"). On July 23, 2008, the Massachusetts Supreme Judicial Court ("SJC") denied the FAR application without opinions (Pet App 012). On September 8, 2008 (Pet App 013), the SJC denied the motion for reconsideration. This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254.

The present Petition for Writ of Certiorari is filed timely pursuant to 28 U.S.C. § 1257 and 2101(c) and Rule 10(1)(c) of the Rules for the U.S. Supreme Court.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

This petition seeks to remedy the petitioner's due process, the right to amend her complaint, the right to appeal in the state Appeal Court level, the right to be heard, and the adversarial process.

Factual Background

The original Complaint was not adequately written due to the pro se petitioner's inexperience (Pet App 014). However, this petition is focusing on the due process and has nothing to do with the merit of the case, so that it is not necessary to list the facts here.

Proceedings Below

A. The Massachusetts Superior Court

On May 11, 2006, the petitioner filed a complaint in the Middlesex Superior Court. In the complaint, petitioner asserted, among other claims, a race discrimination claim under M.G.L. 151B against

Raytheon (Count I); a retaliation claim against Raytheon (Count II); as well as various state law tort claims against Raytheon, Raytheon's employees and other defendants. (Pet App 025-029)

On June 23, 2006, the respondent Raytheon filed a Motion to Dismiss all claims against them under Rule 12(b)(9) for a pending action in federal court, or Stay the Claims in alternative.

On October 11, 2006, the Superior Court granted the Respondent Raytheon's Motion to Dismiss solely under Rule 12(b)(9) for a pending action in the federal court (See the Pet App 001 and the Transcript, Pet App 002). On the same day, the petitioner filed a Motion for Leave to Amend Complaint, in which she attempted to add new defendants and new claims. The Motion was denied on November 6, 2006, and the Final Judgment entered in favor of all defendants on all claims in this case on November 7, 2006 (Pet App 001).

B. The Court of Appeal

The petitioner filed a timely Notice of Appeal from the Final Judgment on November 21, 2006.

On March 25, 2008, the Massachusetts Appeal Court issued its decisions. The decisions ruled:

> "the motion judge **erred** in dismissing the claims pursuant to rule 12(b)(9)," because

> "the United States District Court for the District of Massachusetts is not considered a court of the Commonwealth for the purposes of Mass.R.Civ.P. 12(b)(9)." (Pet App 007, ¶1. emphasis added.)

However, the Appeal Court did not remand the case back. Instead, they dismissed these claim under Mass.R.Civ.P. Rule 12(b)(6) without hearing, despite the issue of Mass.R.Civ.P. Rule 12(b)(6) had never been raised:

> "In reviewing the judge's decision and order, we may affirm the judge's ruling if there was 'any valid ground on which the motion should have been allowed.' Conant v. Sherwin L. Kantrovitz, P.C., 29 Mass. App. Ct. 998, 998 (1990) After review we conclude that counts I, II, V, and VII of Li's complaint could properly have been dismissed pursuant to Mass.R.Civ.P. 12(b)(6), 365 Mass. 745 (1974)." (Pet App 007, ¶2)

The Appeals Court's ruling can be subjected to a *sua sponte* dismissal under Mass.R.Civ.P. Rule 12(b)(6).

Appeals Court further denied the petitioner's Petition for Rehearing, in which, the petitioner

specifically indicated that the issue of Mass.R.Civ.P. Rule 12(b)(6) had never been raised.

C. The Massachusetts Supreme Judicial Court

Focusing on the *sua sponte* decision, the petitioner filed timely Application for Further Appellate Review ("FAR") to the state Supreme Judicial Court.

The respondent Raytheon filed Opposition. The respondent resembled case law Alhom v. Town Wareham, 371 Mass. 621-26 (1976) for *sua sponte* dismiss by the Appeal Court. In Alhom, the case was dismissed in the low court with directed verdict based on immunity issue. While in the Appeal Court, the Alhom was *sua sponte(ly)* dismissed based on fact issue. However, in Alhom, a hearing was provide by the Appeal Court; and in the case in hand, there was no hearing.

On July 23, 2008, The FAR application was denied without opinion (Pet App 012). On September 8, 2008, the motion for reconsideration was denied (Pet App 013).

REASONS FOR GRANTING THE PETITION

The Court should grant the petition because the *sua sponte* dismissal for failure to state a claim by an appellate court, without hearing, is unprecedent in US history [2] and is conflicted with relevant decisions of the US Supreme Court; The *sua sponte* dismissal under Rule 12(b)(6), without an opportunity to amend the complaint, is conflicted with the decisions of the mass majority Federal Circuits and other states Supreme Courts on the same issue.

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[2] According to the petitioner searched in law library.

I. THE US SUPREME COURT HAVE NO OCCASION TO RULE ON *SUA SPONTE* DISMISSAL UNDER RULE 12(B)(6). THE MASS SUPREME COURT'S RULING IS CONFLICTED WITH THE AUTHORTITATIVE DECISIONS OF MASS MAJORITY FEDERAL CIRCUITS AND OTHER STATES' SUPREME COURTS ON THE SAME IMPORTANT MATTER.

Because the new rules are modeled after the Federal Rules of Civil Procedure, the petitioner turns to the federal decisions for guidance.

The US Supreme Court have no occasion to rule on *sua sponte* dismissal under Rule 12(b)(6), see Neitzke v. Williams, 490 U.S. 319, 329, 104 L. Ed. 2d 338 109 S. Ct. 1827 (1989). (footnote 8, we have no occasion to pass judgment, however, on the permissible scope, if any, of *sua sponte* dismissals under Rule 12(b)(6)).

The *sua sponte* dismissal under Rule 12(b)(6), without providing the plaintiff an opportunity to amend the complaint, is conflicted with the authoritative decisions of the United States Courts of Appeals for First, Second, Sixth, Seventh, Ninth, and Eleventh circuits on the same issue. "*..., such dismissals are erroneous unless the parties have*

been afforded notice and an opportunity to amend the complaint or otherwise respond.'" Chute v. Walker, 281 F.3d 314, 319 (1st Cir. 2002); Lewis v. New York, 547 F.2d 4, 6 (2d Cir. 1976) (citations omitted); *Tingler v. Marshall* , 716 F.2d 1109, 1111-12 (6th Cir. 1983) , and Ricketts v. Midwest Nat'l Bank , 874 F.2d 1177, 1184 (7th Cir. 1989)) (citations omitted); see also Jackson v. Arizona, 885 F.2d 639, 640 (9th Cir. 1989);. Farese v. Scherer 342 F.3d 1223 (11th Cir. 08/19/2003) (citations omitted).

The Supreme Courts of Ohio, Wyoming, and Arizona had adopted the opinions of federal courts: *"... a sua sponte dismissal without notice to the parties is fundamentally unfair to litigants."* *Mayrides v. Franklin Cty.Prosecutor's Office* (1991), 71 Ohio App.3d 381, 384; Jenkins v. Miller, 2008 WY 45, 180 P.3d 925 (Wyo. 04/14/2008); *Torrey v. Twiford, 713 P.2d 1160 (Wyo. 1986)* ; Hill v. Zimmerer, 839 P.2d 977, 981 (Wyo. 1992) ; Acker v. Chevira, 934 P.2d 816, 188 Ariz. 252, 239 Ariz. Adv. Rep. 22 (Ariz.App.Div.1 03/20/1997). (citations omitted)

This Court should grant the petition to compel conformity with the mass majority federal circuits and the other states' Supreme Court, and to ensure that the petitioner and other litigants in

Massachusetts have equal access to justice under Mass. R. Civ. P. 12(b)(6).

II. THE *SUA SPONTE* DISMISSAL UNDER RULE 12(B)(6) BY APPELLATE COURT, WITHOUT HEARING, IS UNPRECEDENT IN US HISTORY, AND IT IS CONFLICTED WITH RELEVANT DECISIONS OF THE US SUPREME COURT.

As indicated before, the *sua sponte* dismissal for failure to state a claim by appellate court, without hearing, is unprecedent in US history, the petitioner turns to other *sua sponte* decisions by US Supreme Court for guidance.

Historically, the US Supreme Court discussed appellate *sua sponte* action in *Singleton v. Wulff*, 428 U.S. 106 (1976) and stated,

> "a federal appellate court does not consider an issue not passed upon below." Supreme Court Justice John Paul Stevens in *Patterson v. McLean Credit Union*, stated "the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review. New Jersey v. T. L. O.,468 U.S. 1214, 1216 (1984)

> (dissenting from order directing reargument). If the Court decides to cast itself adrift from the constraints imposed by the adversary process and to fashion its own agenda, the consequences for the Nation -- and for the future of this Court as an institution -- will be even more serious than any temporary encouragement of previously rejected forms of racial discrimination. The Court has inflicted a serious -- and unwise -- wound upon itself today."

The only issue that the US Supreme Court allowed appellate *sua sponte* dismissal was for timeliness. See John R. Sand & Gravel Company v. United States 552 U.S, (2008), the US Supreme Court of claims "statute of limitations requires *sua sponte* consideration of a lawsuit's timeliness, despite the Government's waiver of the issue." Turner v. City of Memphis, 369 U.S. 350 (1962) , or where "injustice might otherwise result." Hormel v. Helvering, 312 U.S., at 557. "Ordinarily an appellate court does not give consideration to issues not raised below."

a. APPELLATE COURT'S S*UA SPONTE* DISMISSAL IS

INCONSISTENT WITH THE FUNDAMENTAL PRINCIPLE OF DUE PROCESS.

The US Supreme Court has emphasized on numerous occasions that this right of due process, at a minimum, guarantees citizens the right "to be heard" –that is, an opportunity to present objections and arguments with regard to governmental actions that may result in a deprivation of their life, liberty, or property.

See, Nelson v. Adams USA, Inc., 529 U.S. 460, 466 (2000); Richards v. Jefferson County, Alabama, 517 U.S. 793, 797 n.4 (1996) ("The opportunity to be heard is an essential requisite of due process of law in judicial proceedings."); Grannisv. Ordean, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard.").

Moreover, the US Supreme Court has held that actions by appellate courts constitute governmental actions that are subject to these due process guarantees. See, Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 678 (1930) (holding that "the judgment of the Supreme Court of Missouri must be reversed, because it has denied to the plaintiff due process of law—using that term in its primary sense of an opportunity to be heard and to

defend its substantive right"). *Ownbey v. Morgan*, 256 U.S. 94, 111 (1921) ("[Due Process] restrains state action, whether legislative, executive, or judicial, within bounds that are consistent with the fundamentals of individual liberty and private property, including the right to be heard where liberty or property is at stake in judicial proceedings.")

Back to the case in hand, the Appeal Court's ruling constitutes governmental actions that are subject to these due process guarantees. When the Appeal Court *sua sponte* dismissed the case and denied the petition for rehearing and the state Supreme Judicial Court denied the FAR application, the US Supreme Court became the final chance to excise the petitioner's right to be heard. According, the petition should be reviewed as a mandatory consideration, in order to balance the due process.

b. THE APPELLATE COURT'S *SUA SPONTE* DISMISSAL UNDER RULE 12(B)(6) IS INCONSISTENT WITH THE ADVERSARY PROCESS.

American judicial system replies on the adversary process. The fundamental premise underlying the adversary system is that a court is

more likely to reach the "correct" decision because the advocates will uncover and present more useful information and arguments to the decision makers than the court would develop on its own. See, Penson v. Ohio, 488 U.S. 75, 84 (1988) ("[The] system is premised on the well-tested principle that truth—as well as fairness—is 'best discovered by powerful statements on both sides of the question.'"); Polk County v. Dodson, 454 U.S. 312, 318 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness."); Mackey v. Montrym, 443 U.S. 1, 13 (1979) ("[O]ur legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error."); Israel, *supra* note 3; Sward, *supra* note 3, at 316-19; The "premise of our adversarial system [is] that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." See, Barr v. Day, 124 Wn.2d 318, 333, 879 P.2d 912 (1994) (Utter, J., concurring in concurrence/dissent) (quoting Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983)).

Back to the case in hand, since there was no adversarial process, the parties had no opportunity to remand the court of Raytheon's Alternative to

Stay the Claims. The parties had no opportunity to argue on whether this claims could prevail under 12(b)(6). Accordingly, the petition should be reviewed as a post-judgment remedy.

Therefore, the Court should grant the petition to compel conformity with this Court to ensure that the petitioner and other litigants in Massachusetts have equal due process under Massa. R. Civ. P. 12(b)(6).

CONCLUSION

For the foregoing reasons, the petition for a writ certiorari should be granted.

Respectfully submitted,

YONG LI (pro se)

/s/

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Email: yli01776@yahoo.com

pro se petitioner

Date: January 17, 2009

No. 08-____

In the

Supreme Court of the United State

Yong Li,

Petitioner,

v.

Raytheon Company and others

Respondents.

Civil Appeal To the

Massachusetts Supreme Judicial Court

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Yong Li
32 Willow Road,
Sudbury MA 01776
pro se Petitioner

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Commonwealth of Massachusetts

County of Middlesex

The Superior Court

CIVIL DOCKET# MICV2006-01686

Yong Li, Plaintiff(s)

Vs

Raytheon company et al, Defandant(s)

JUDGMENT ON MOTION TO DISMISS

(Mass.R.Civ.P. 12b)

This action came on for hearing before the Court, Emest B. Murphy7, Justice upon the Defendants', motion to dismiss pursuant to Mass. R.Civ.P. 12(b), and upon consideration thereof,

It is ORDERED AND ADJUDGED:

That the Complaint of the plaintiff(s), Yong Li, is hereby dismissed against the defendants.

Dated at Cambridge, Massachusetts this 7th day of November, 2006.

By:/s/ William Smith

Assistant Clerk

THE COURT: well, remedies are another thing. You know, you've got – in other words, we don't let you say the same thing in two different forums at the same time, and that's what you're trying to do. That's what we call duplicitave litigation. It runs the risk of inconsistent adjudication. It uses resources of both courts. We just can't let that happened. So, I'm going to allow the motion as to Mr. Kavanaugh's clients.

MS. LI: You mean you want to Dismiss my case against –

THE COURT: I'm going to dismiss your state court case, this one, against Raytheon because you've got it over in the Federal Court, and it's the same case.

MS. LI: Well, I–

THE COURT: Now, stop, Ms. Li.

COMMONWEALTH OF MASSACHUSETTS

Appeals Court for the Commonwealth

At Boston

In the case no. 07-P-156

YONG LI

VS.

RAYTHEON COMPANY & others

Pending in the Superior

Court for the County of Middlesex

Ordered, that the following entry be made in the docket:

Judgment affirmed.

By the Court, /s/

Clerk

Data March 25, 2008

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

07-P-156

YONG LI

Vs.

RAYTHEON COMPANY & others.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

At issue in this appeal is the propriety of the dismissal, pursuant to Mass.R.Civ.P. 12(b), 365 Mass. 754 (1974), of Yong Li's eight-count complaint against the defendants, and the denial of her motion for leave to amend the complaint for the purpose of adding new claims and defendants.[2] We affirm the judgment, but do so, in part, for reasons other then those relied upon by the motion judge.

As a threshold matter, we note that in this appeal, Li has chosen to challenge the dismissal of only some

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[1] Ian C. Mitchell, Arthur Buliung, Raytheon EAP, and John Didio. dismissed from the case below without opposition. The Massachusetts Division of Professional Licensure is not a party to this appeal.

[2] Contrary to Li's assertion in her brief concerning the absemce pf amu "actual entry of judgment," the Superior Court civil docket establishes that a "judgment on Motion to Dismiss (MRCP 12b)" entered on November 8, 2006, dismissing all claims in the case. (Li's Add. At 32; A. 4-5)

of her claims. Any and all claims not addressed in her briefs are deemed waived. See Mass.R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975); Sullivan v. Chief Justice for Admn. & Mgmt. of the Trial Ct., 448 Mass. 15, 36 (2006). In addition, any and all factual assertions in Li's brief that are unsupported by an appropriate reference to the record, carry no weight here, and must be discounted. [3] See Jones v. Wayland, 374 Mass. 249, 252 n. 3 (1978); Kuban v. Kuban, 48 Mass. App. Ct. 387, 388 n.5 (1999).

Turning to so much of her complaint that Li has chosen to pursue, in counts I and II of her complaint, Li alleged that she was subjected to widespread racial discrimination at work by several individuals in violation of G. L. c. 151B as well as to retaliation following her internal complaint about that discrimination in 2002. In count V, Li alleged that she sustained emotional distress as a result of the improper conduct of the defendants, including their hiding of reports, misrepresentations, and physical intimidation. (S. A. 10-11) In count VII, Li alleged that the defendants tortiously interfered with her advantageous relations by, among other actions, "knowingly induced homicide investigation [in

[3]For instance, Li claims, without substantiation, that the Federal court judge denied her motion to add the G.L.c. 151B claims because, a,mong other reasons, of a "mis-communication due to Li's hospitalization."

August, 2004], then calculatedly [sic] cover up and distort the truth." (S. A. 11)

Dismissal of claims based on prior pending action. A comparison of the two complaints provided by Raytheon's attorneys demonstrates that Li sued the same Raytheon defendants in a prior pending Federal court action and that Li's claims arose from the same set of operative facts. (S. A. 1-20) All relevant facts alleged in support of her Superior Court complaint occurred and were known to Li before she commenced the Federal court action. [4] The motion judge dismissed counts I, II, V, and VII of Li's complaint in this Superior Court action pursuant to Mass.R.Civ. P. 12(b)(9), 365 Mass. 755 (1975), based upon the "[p]endency of a prior action in a court of the Commonwealth." However, the United States District Court for the District of Massachusetts is not

[4] In her Federal court complaint, Li asserted racial and retaliatory discrimination claims under Title VII of the Civil Rights Act of 1964 as well as many of the same tort claims asserted here (including. As herein relevant, tortuous interference with advantageous relations and emotional distress). For reasons left unexplained on this record, Li failed to assert the G.L.c. 151B claims in the Federal action when she had the opportunity to do so as of right. The Federal court docket establishes that after Li was allowed to amend her complaint in whole or in part on several occasions, a Federal court judge denied Li's motion to post her third amended complaint. Shortly thereafter, the same judge denied her motion to amend the complaint to add the G.L.c. 151B claims. We note that the United States Court of Appeals for the First Circuit has recently affirmed the summary judgment dismissing Li's Federal claims. (Li's Add. At 38-39)

considered a court of the Commonwealth for the purposes of Mass.R.Civ.P. 12(b)(9).[5] See Doe v. The Governor, 381 Mass. 702, 706 (1980).[6] Therefore, the motion judge erred in dismissing the claims pursuant to ruled (12(b)(9).

In reviewing the judge's decision and order, we may affirm the judge's ruling if there was "any valid ground on which the motion should have been allowed." Conant v. Sherwin L. Kantrovitz, P.C., 29 Mass. App. Ct. 998, 998 (1990). After review we conclude that counts I, II, V, and VII of Li's complaint could properly have been dismissed pursuant to Mass.R.Civ.P. 12(b)(6), 365 Mass. 754 (1974).

The motion judge dismissed the claims against John Didio, pursuant to rule 12(b)(6) for the failure to state a claim upon which relief could be granted. See Schaer v. Brandeis Univ., 432 Mass. 474, 477-

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[5] Li's emotional distress claims against the Raytheon defendants were barred by the exclusivity provision of the workers' compensation act. See Green v. Wyman-Gordon Co., 422 Mass. 551, 558-560 (1996).

[6] The appropriate action would have been for the judge to exercise his discretion, by virtue of his right to control disposition of the docket, to grant a stay of this action pending the outcome of the Federal litigation. See Municipal Lighting Comm. Of Peabody v. Stasthos, 13 Mass. App. Ct. 990, 991 (1982). If a stay had been granted, subsequent events (the dismissal of the Federal claims and the affirmatnce of that dismissal by the First Circuit) reveal that the issue of the propriety of the motion judge's dismissal would be moot because all claims that parallel the Federal claims are now barred by res judicata.

478 (2000). Of the four claims in the complaint not waived by Li in this appeal, only one (count V, alleging "negligent/reckless/intentional infliction of emotional distress") was asserted against Didio. We agree with the motion judge that Li could prove no set of facts in support of her emotional distress claims that would entitle her to relief. See Foley v. Polaroid Corp., 400 Mass. 82, 97-100 (1987); Quinn v. Walsh, 49 Mass. App. Ct. 696, 706-707 (2000).

Li's claim of racial discrimination by Raytheon pursuant to G. L. c. 151B is based upon allegations that Raytheon, in effect, supported misconduct by its supervisor Buliung. This claim fails, however, because nowhere does she allege that Buliung discriminated against her on the basis of race.

The retaliation claim brought by Li is centered on her allegations that Raytheon and the individual defendants (1) caused her to have a "mental evaluation as a means of reprisal or to control anti-discrimination complaint," and (2) sent her a letter, which she viewed as a threat to terminate her "while she was exercising her right of Family Medical Leave Act (FMLA)." Here, Li failed to allege the required element that she suffered an adverse employment action. See Tate v. Department of Mental Health, 419 Mass. 356, 364 (1995); MacCormack v. Boston Edison Co., 423 Mass. 652, 662 (1996). Neither the

meeting with a human resource supervisor and Didio nor the letter sent during Li's FMLA leave constitute adverse employment actions. Accordingly, her claim for retaliation fails.

Li's claim of tortious interference with advantageous business relations also fails. Here, she alleges that defendants Mitchell and Buliung "took business advantage and exploited plaintiff's vulnerability" apparently by misrepresenting certain facts to Didio. Those misrepresentations, she alleges, led Didio to question her as to whether she thought of hurting others. Didio's inquiries and later actions, she says, "produced a delusion environment around plaintiff and caused her severe mental disorder with psychotic feature."[7]

To prevail on a claim of tortious interference with business relationships, Li must demonstrate that (1) she had a business relationship with a third party; (2) the defendants knowingly induced a breaking of the relationship; (3) the defendants' interference with the relationship was intentional and improper in

[7] On August 30, 2004, Li email the chairman and CEO of Raytheon stating, "John Didio with his professional skill poisoned my brain, he treated me, a victim as a potential murder, this is evil behavior! As I'm sitting in my office and working, but quiet offenly, [sic] I want to scream!!!" In response to this email, Raytheon placed Li on administrative leave, requiring her to see an EAP-referred psychiatrist, and requiring a satisfactory evaluation from an EAP counselor as a condition for her return to active employment.

motive or means; and (4) Li was harmed by the defendants' actions. Blackstone v. Cashman, 448 Mass. 255, 260 (2007). Where the defendants are officials of the employer acting within the scope of their employment, they are shielded from liability unless the Li demonstrates that their actions were motivated by actual malice, defined as "a spiteful, malignant purpose, unrelated to the legitimate corporate interest." Id. At 260-261.

Here, Li failed to allege, among other things, that the defendants interfered with her business relationship with a third party, nor has she identified how she was harmed by the complaint fails to state a claim.

Motion to amend. We review the judge's denial of a motion to amend the complaint for abuse of discretion. See Mancuso v. Kinchla, 60 Mass. App. Ct. 558, 572 (2004). Here, Li has failed to provide this court with any analysis at all, reasoned or otherwise, of the abuse of discretion issue. See Berman v. Linnane, 434 Mass. 301, 305 (2001); Patel v. Amresco SBA Holdings, Inc., 69 Mass. App. Ct. 192, 196-197 (2007). Li has thus failed to meet her burden of

demonstrating error in the judge's ruling. [8] See Mancuso v. Kinchla, supra.

Judgment affirmed.

By the Court (Cowin, Cohen & Granham, JJ)

Clerk /s/

Entered: March 25, 2008

[8] We also note that in dereliction of her duties as the appellant, Li has failed to provide us with copies of any of the motions decided in the Superior Court, or any opposition memoranda. Given these record inadequacies, there is no need to review the propriety of the denial of her motion to amend. See Chokel v. Genzyme Corp., 449 Mass. 272, 279-280 (2007).

Supreme Judical Court for the
Commonwealth of Massachusetts

John Adams Courthouse

One Pemberton Square, Suite 1400, Boston,
Massachusetts 02108-1724

Telephone 617-557-1020, Fax 617-557-1145

Yong Li
32 Willow Road
Sudbury, MA 01776

RE: Docket No. FAR-17039
Yong Li
Vs.
RAYTHEON COMPANY & others

Middlesex Superior Court No. MICV2006-01686
A.C. No. 2007-P-0156

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on 07/23/08, the above-captioned Application for Further Appellate Review was denied.
(Cowin, J., recused)

Susan Mellen, Clerk

Dated: July 23, 2008
To: Yong Li
Michael R. Bernardo, Esquire
Richard J. Poliferno, Esquire
Erin M. Mullen, Esquire
Neil P. Olson, Esquire

SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS
John Adams Courthouse
One Pemberton Square, Suite 1400, Boston,
Massachusetts 02108-1724
Telephone 617-557-1020, Fax 617-557-1145

TO: Yong Li
32 Willow Road
Sudbury, MA 01776

RE: No. FAR-17039

YONG LI
vs.
RAYTHEON COMPANY & others

NOTICE OF DOCKET ENTRY

Please take note that on September 8, 2008, the following entry was made on the docket of the above-referenced case:

DENIAL of petition to reconsider denial of FAR application.

Susan Mellen, Clerk

Dated: November 26, 2008

TO: Yong Li
Michael R. Bernardo, Esquire
Richard J. Poliferno, Esquire
Erin M. Mullen, Esquire
Neil P. Olson, Esquire
John S. Marshall

COMMONWEALTH OF MASSACHUSETTS

Middlesex County Superior Court

Docket Number 06-1686

YONG LI The plaintiff	)
V,	)
RAYTHEON COMPANY,	)
IAN MITCHELL,	)
ARTHUR BULIUNG,	)
RAYTHEON EAP,	)
JOHN DIDIG,	)
DIVISION OF PROFEOSSIONAL LICIENSURE,)	
Defendants	)

COMPLAINT

Parties

1. The plaintiff, Yong Li, was born in China, completed two degrees, and had worked in England for 7 years. She came to U.S.A. with H1b visa, was hired by Raytheon as a software engineer on January 5, 1998. After 7 years of employment, she has been on medical leave since October 2004. She lives in Sudbury, MA.

2. Defendant Raytheon is a company, located 1001 Boston Post Road, Marlborough, MA, 01752. Tel. 508-490 1000.

3. Defendant Mitchell is a manager of the Transportation Conatrol Systems Department within the Air Traffic Management Business area at Raytheon.

4. Defendant Buliung was a human resource officer in Raytheon down at Marlborough office.

5. Defendant EAP (Employee Assistant Program) is a sub contract of Raytheon Company, located 870 Winter Street, Waltham, MA, 02457.

6. Defendant Didio was a licensed social worker and worked as a counselor in Raytheon EAP (Employee Assistant Program) in 2004.

7. Defendant Division of Profcssional Licensure (herein referred as the License Board) is a government office, locates 239 Causeway Street, Boston, MA 02114.

Jurisdiction

8. The court has jurisdiction over this matter for Discrimination and Retaliation in Violation Chapter 151B of the Massachusetts General Laws;

9. This court has jurisdiction over this matter in Violation Mass. Civil Right Act (M.G.L. Chapter 12:§11);

10. This court has jurisdiction over this matter in Violation Common Tort Law for Negligent/Reckless/Intentional Infliction of Emotional Distress, Misrepresentation & Deceit, and Tortious Interference with Advantageous Relations.

11. This court has jurisdiction over this matter in Violation M.G.L. Chapter 214 section;

12. This court has jurisdiction over this matter in Violation Code of Massachusetts regulation 258 §20 for social workers;

13. This court has jurisdiction over this matter for Registration of Certain Professions and Occupations in Violation of Massachusetts General Laws Chapter 112 section 64;

Counts

1) Racial Discrimination in violation of M.G.L. Chapter 151B;

2) Retaliation in violation of M.G.L. Chapter 151B;

3) Violation of MCRA by putting her on administrative leave in violation of her First Amendment rights;

4) Violation of MCRA by using intimidation in an attempt to cause relinquish Fifth Amendment right against self-incrimination and Violation of Code of Massachusetts regulation 258;

5) Negligent/Reckless/Intentional Infliction of Emotional Distress;

6) Misrepresentation & Deceit;

7) Tortious Interference with Advantageous Relations;

8) Breach duty in Violation of Massachusetts General Laws Chapter 112 section 64.

Facts

14. Plaintiff felt been cornered in a closed room by her ex-task manager Jen Lewis and verbally attacked in 2001. She filed a racial discrimination complaint to Raytheon HR in 2002.

Defendant Raytheon did inappropriate response to this complaint as following:

a. The investigator, Mattie Ervin, failed to interview co-workers favorable to the plaintiff.

b. Defendant Raytheon, through HR, failed to inform plaintiff adequately of the investigation result.

c. With respect to plaintiff's persistent request of the Mattie Ervin report, HR officer Megan Turley arranged a licensed social worker, John Didio, interviewed plaintiff on 1/28/03, which plaintiff had had no knowledge of mental evaluation.

15. Defendant Buliung failed to inform plaintiff of his investigation in 2003. Without plaintiff's knowledge, he fabricated the memo of 7/8/03 as if he made a thorough investigation.

16. Defendant Mitchell, a newly department manager and Ms. Lewis' friend, tried to stop plaintiff go home by introducing a job in another states at the end of 2003 when plaintiff had finished 10 months deployment down Virginia. Fortunately, the plaintiff's section manager down Virgiinia transferred her to another department in Marlborough MA.

17. After back to Marlborough in 2004, plaintiff was stared at by Ms. Lewis whenever they met alone in company. Plaintiff felt physically threatened.

18. Plaintiff back to Ian Mitchell's department after a re-organization in April 2004. Defendant Mitchell manipulated a retaliatory harassment against the plaintiff:

a. Without plaintiff's knowledge, he removed Scott Oglesby, plaintiff's section manager, from man power meeting for a pretext "due to her husband in same section", therefore blocked plaintiff's further chance of assignment;

b. Mr. Oglesby pushed plaintiff to quit by saying "you should leave, because you have problem with Jen Lewis",

c. Mr. Oglesby pushed plaintiff go to another state by saying "the company's going to layoff, I'm sure your name in the list".

19. Defendant Raytheon failed to respond to the plaintiff's complaint about Ian Mitchell's misconduct as following:

a. Ignored plaintiff's email of 6/1/04 to Arthur Buliung, which stated that her life "full of unpredictable scare."

b. Failed to inform plaintiff the fact that Ian Mitchell removed Mr. Oglesby from man power meeting.

c. Failed to interview the ERAM (a project) leads who had offered plaintiff a new assignment in June 2004.

d. Failed to inform plaintiff of whether it was true or not that "the company's going to layoff, I'm sure your name [the plaintiff] in the list";

e. Fabricated plaintiff's "strength problem" although plaintiff had pretty good performance during the employment in Raytheon.

20. As a result of the HR's unhelpful response, Mr. Oglesby continually harassed plaintiff on 7/29/04:

a. He deliberately denied that he had told plaintiff that "the company's going to layoff; I'm sure your name in the list", plaintiff was shocked

b. He laughed at plaintiff by saying "When Jen Lewis became the Lab manager, you will be in trouble;"

c. He reprimanded plaintiff for "strength problem" by saying "Shame".

21. Plaintiff was nervous when continually under Ms. Lewis' offensive staring. Plaintiff sent an email to Defendant Buliung to address her personal safety concern and family safety concern on 7/29/04, the email stated "if anything happened on me or on my family, don't believe that it's an accident, it may be a 'murder'";

22. With respect to plaintiff's own safety concern, Defendant Buliung arranged Defendant Didio to interview plaintiff on August 3rd 2004. This interview violated the plaintiff's lawful rights as following:

a. The interview happened without informed consent. Plaintiff had had no knowledge of mental evaluation. She thought that John Didio could investigate her complaint.

b. Before the interview, Defendant Buliung mischaracterized the email and knowingly induced a homicide interrogation.

c. Before asking about the email, Defendant Didio asked abusive question "do you wanat to kill someone?"

d. Defendant Didio physically intimidated plaintiff with finger pointing and scurrilous stare during the interview.

e. Plaintiff was traumatized and felt as if being "mentally raped". She started flashback and was not able to concentrate her job since then.

f. Defendant Buliung never informed plaintiff about Jen Lewis' offensive stare incident.

g. Without plaintiff's knowledge, defendant Buliung distorted this interview by changed "kill" to "harm" and misrepresented HR memos. These memos affected plaintiff's complaint EEOC and Workers Compensation lawsuit eventually.

23. Under flashback , plaintiff sent an email RAPA (Raytheon Asian and Pacific Association) on 8/8/04 and spoke out the homicide interrogation;

24. With respect to the reactions from RAPA, defendant Buliung and Stephanie Kolenski (HR officer) arranged a caferia meeting (to accommodate the closed room phobia) next day, Defendant Buliung covered up the truth by following steps:

a. He banned the plaintiff's right to send "personal" email to RAPA, and then he emailed to RAPA (Raytheon Asia Pacific Association) on 8/9/04 and falsely claimed that the problem/issue caused by John Didio "had been resolved".

b. He claimed that Defendant Didio did nothing wrong but simply doing his job.

c. Without plaintiff's knowledge, he misrepresented the memo of 8/9/04 by taking "Stephanie said that John did not ask 'do you want to kill someone" out of the context, in fact Ms. Kolenski said that what Ms. Didio asked was "do you want to kill someone or do you want to kill yourself?"

25. On 8/23/04, plaintiff sent an email to Raytheon Ethic Group and complained John Didio's homicide interrogation.

26. On 8/24/04, Defendant Bu.iung interfered with the investigation of the Ethic Group, he changed Mr. Didio's question to "Do you want to hurt yourself or others". Ethic Group rejected plaintiff's complaint on 8/26/08.

27. On 8/25/04,(?), Raytheon Lab manager Mary Ann King set a meeting to demand plaintiff "stop sending email" and "move forward", "report to Arthur Buliung only" if plaintiff want to complaint.

28. Defendant Buliung controlled almost all meetings, where plaintiff was never informed adequately. She had no knowledge that defendant Buliung calculatedly misled the entire office, she just felt extremely horror.

29. On 8/26/04 (?) in Ms. King's office, plaintiff told Ms. King that John Didio's interview made her want to suicide, Ms. King answered "he [John Didio] is not intentional", no any action was taken.

30. On 8/27/04, Ed Tang, a Chinese manager, emailed to plaintiff "Got words from Marlboro [Ms. King] that you are smiling – that makes everyone happy. Keep it up"

31. Under flashback, plaintiff sent an email to Raytheon CEO Bill Swanson on 8/30/04 and stated "I want to scream" and "this is mu[r]der, slowly.

32. With respect to the email to CEO, HR manager Paul Clegg asked plaintiff to stay in a closed room on 8/31/04 and claimed to put her on paid leave, plaintiff felt being cornered again, she almost fell down once she entered the room and re-enforced her trauma;

33. Plaintiff was put on unpaid leave on 10/4/04, the HR letter stated the plaintiff's reinstatement will be made "after review of the EAP referred physician's evaluation by Raytheon Global Health Services". She was ordered to see a psychiatrist, Dr. Jule Reade on 10/7/04.

34. Defendant Raytheon prefixed the mental evaluation by sending the secret Mattie Ervin report to Dr. Reade. In deed, Dr. Reade ignored the trauma event at all. She only concluded plaintiff was "depression with psychotic feature" and "not fit to work".

35. Raytheon EAP, through its manager Irving Kooris, hid the evaluation conclusion after receiving Dr. Reade's brief report, and then requested the detail report. Under pressure, plaintiff "gave" Dr. Reade permission to release the detail report to Defendant Raytheon.

36. Defendant Raytheon and Raytheon EAP not only refused to disclose the evaluation conclusion, but also offered plaintiff to go back to work at the end of October 2004, misled plaintiff believed that Dr. Reade agreed the she was able work. Furthermore, Defendant Raytheon attempted to let plaintiff sign a claim to waive her right to sue if she wanted a voluntary layoff.

37. Plaintiff started FMLA claim at the end of the October 2004, defendant Raytheon counted the FMLA since 10/4/04, the date of unpaid leave.

38. Raytheon EAP refused to send a copy of Dr. Reade's report to plaintiff, but agreed to send a copy to her primary doctor. But when plaintiff visited her own doctor and realized that even her own doctor does not have right to give a copy to the plaintiff, because this report belongs to Raytheon or EAP.

39. While hiding Dr. Reade's report and while the plaintiff's short term disability claim was denied, Defendant Raytheon warned plaintiff to go back to work in 6 days notice and threatened to terminate her, recklessly agitating plaintiff. Defendant Raytheon failed to respond to her email of 12/5/04

to Raytheon HR leader Ken Peden which complained about the warning letter.

40. The MetLife representative Ken Lemelle explained to plaintiff about Dr Reade's conclusion at January 2005. Plaintiff realized the deceptive behavior and became in deteriorating mental conditions:

a. Plaintiff started to take anti-psychotic (Risperdal) medication to calm down since 1/18/05, and claimed long term disability.

b. Defendant Raytheon failed to respond to her email of 1/21/05 to Mr. Peden which complained about hiding doctor report.

c. Under flashback, plaintiff experience physically out of control when she drove back to office on 2/8/05 and was crying for being [mentally] raped by John Didio.

41. Plaintiff was terminated on 1/2/04, and then reinstated in May 2005 after filing to EEOC.

42. Plaintiff sent an email to Raytheon muti-user list and described the detail of the homicide interrogation. Both defendant Buliung and defendant Didio left the company short after.

43. Raytheon EAP ignored the plaintiff's request of a copy of John Didio's memos until April 2006.

44. Plaintiff filed to EEOC on 4/21/05, file to MCAD on 4/22/05 for charges of racial discrimination, retaliation and disability discrimination.

45. Defendant Raytheon responded to EEOC by following behaviors:

a. Continually fabricated the plaintiff's "strength problem",

b. Reinstated the plaintiff's employment with a reason of due to MetLife approved her long term disability claim, hope plaintiff drop the case.

46. EEOC dismissed the plaintiff's complaint on 7/15/05. MCAD affirmed EEOC dismissal on 9/28/05.

47. DIA denied the plaintiff's Workers Comp claim on 10/7/05, defendant Buliung's memo played a big role. Although Defendant Raytheon never informed plaintiff of Jen Lewis' staring incident, they denied this incident inDIA's Court by saying "nobody watched", plaintiff was shocked.

48. On 11/12/05, plaintiff received her personnel file from defendant Raytheon. She had three discoveries:

a. Defendant Buliung fabricated the memo of 7/8/03 which stated "Conall McGleenan said that William Kerr agreed with him", in fact it never happened.

b. Defendant Mitchell removed Mr. Oglesby from man power meeting for a pretext "due to her husband in same section", therefore blocked plaintiff's further chance of assignment at that time.

c. Defendant Buliung consistently, calculatedly misrepresented HR memos with respect to the John Didio's interview of 8/3/04.

49. On 10/7/05, plaintiff filed to Federal Court for Title VII, Federal Court denied her motion to add 151B counts on 4/7/06, and also denied her motion to request punitive damage.

50. Social Security Administration approved plaintiff's long term mental disability claim in March 2006.

51. As a result of the discriminatory action of Raytheon, defendant Buliung, defendant Mitchell and defendant Didio, plaintiff has suffered and will continue to suffer damages, including but not limited to loss of income, loss of employment benefits, loss of professional opportunities, loss of personal and professional reputation, affected her family life, loss of community standing, other financial losses and emotional and mental distress (PTSD, Major Depression and General Anxiety).

COUNT I: Racial Discrimination

52. Plaintiff repeats each and every allegation contained in paragraphs 14 through 48, as if fully set forth here.

53. Defendant Buliung consistently bias towards to Jen Lewis and bias against plaintiff.

54. Defendant Raytheon systematically cooperate defendant Buliung's misconduct.

55. Count 1 against defendant Raytheon.

COUNT II: Rataliation

56. Plaintiff repeats each and every allegation contained in paragraphs 14 through 48, as if fully set forth here.

57. Defendant Mitchell retaliated against plaintiff to satisfy his friend Jen Lewis.

58. Defendant Raytheon and defendant Buliung tolerated Mr. Mitchell's misconduct. Furthermore, they continually jointly retaliated against plaintiff when she complained.

59. Raytheon HR set up mental evaluation as a means of reprisal or to control anti-discrimination complaint.

60. Raytheon HR set up warning letter to threat to terminate plaintiff while she was excising her right of family medical leave act (FMLA);

61. Count 2 against defendant Raytheon, defendant Mitchell and Defendant Buliung.

COUNT III: Violate MCRA of the Fist Amendment Rights

62. Plaintiff repeats each and every allegation contained in paragraphs 21 through 32, as if fully set forth here.

63. Defendant Raytheon banned plaintiff's right to report to RAPA, and put her on administrative leave after she reported to the CEO, violated her first amendment rights of free speaking.

64. Count 3 against defendant Raytheon.

COUNT IV: Violate MCRA of the Fifth Amendment Rights

65. Plaintiff repeats each and every allegation contained in paragraph 22, as if fully set forth here.

66. Defendant Didio physically intimidated plaintiff while doing homicide interrogation, violated her Fifth Amendment rights against self-incrimination plaintiff suffered PTSD.

67. Defendant Didio complied an interview without informed consent, violated CMR 258 §20 social workers ethic code.

68. Defendant Raytheon encouraged and covered up defendant Didio's misconduct.

69. Count 4 against defendant Raytheon and defendant Didio.

COUNT V: Negligent/Reckless/Intentional Infliction of Emotional Distress

70. Plaintiff repeats each and every allegation contained in paragraphs 14 through 48, as if fully set forth here.

71. Defendant Buliung made information sanction by hiding investigation report, no adequately inform, misrepresented memos, misinformed EAP counselor, Ethic Group, distort the truth, created a delusion environment around plaintiff.

72. Defendant Didio physically intimidated plaintiff, asked abusive question to traumatize plaintiff.

73. Defendant Raytheon and Defendant EAP hid Dr. Reade's report disregard plaintiff's mental condition.

74. Defendant Raytheon recklessly agitated plaintiff by sending a warning letter to threat plaintiff.

75. Count 5 against defendant Raytheon, defendant Buluing and defendant Didio.

COUNT VI: Misrepresentation & Deceit

76. Plaintiff repeats each and every allegation contained in paragraphs 15 through 48, as if fully set forth here.

77. Defendant Buliung misrepresentation HR memos, misinformed EAP counselor, Ethic Group, distort the truth.

Count 6 against defendant Buluing.

COUNT VII: Tortious Interference with Advantage Relation

78. Plaintiff repeats each and every allegation contained in paragraphs 14 through 48, as if fully set forth here.

79. Defendant Raytheon, defendant Mitchell and defendant Buliung took business advantage and exploited plaintiff's vulnerability. Defendant Buliung intentionally misinformed the circumstances to Mr. Didio and knowingly induced homicide interrogation, then calculatedly cover up and distort the truth. His information sanction and communication sanction produced a delusion environment around plaintiff and caused her severe mental disorder with psychotic feature.

80. Raytheon EAP prefixed Dr. Reade report by filing her secret report, hid the evaluation conclusion, and ignored plaintiff request of memo(s), but sent memos to Frank Ruel, and interfered with her Workers Compensation lawsuit.

81. Count 7 against defendant Raytheon, defendant Mitchell, defendant Buluing and defendant EAP.

COUNT VIII: Breach duty in Violation of M.G.L. §112 section 64

82. The license Board deliberately ignored the undisputable fact: John Didio violated 258 CMR 20.02: "Performance of Services Without Informed Consent".

83. The License Board deliberately ignored the evidence from key witness Stephanie Kolensk8i John Didio indeed acted unprofessional conduct [258 CMR 20.01], negligent or incompetent practice [258 CMR 20.4] by physically intimidation.

84. The License Board negligently accepted John Didio's vague response, did not ask Mr. Didio for how he actually "introduce the subject of potential harm …"?

85. Count 8 against defendant Liciense Board.

Prayers for Relief

WHEREFORE, plaintiff Yong Li demands that:

a. Judgment for monetory damages entered in favor of Ms. Li against defendant Raytheon, defendant Mitchell,

defendant Buliung, Defendant EAP and defendant Didio for Count I through Count VII.

b. The Court award Ms. Li for emotional distress for Count I through Count VII.

c. The Court award Ms. Li for punitive damages for Count I through Count VII.

d. The Court enter an order to restrain Raytheon EAP's right of possession the detail report of Dr. Reade regard the plaintiff's mental evaluation.

e. The Court enter an order to remove defendant Buliung's memos from plaintiff personnel file, and replace those information by Ms. Kolenski's deposition.

f. The Court enter an order to the License Board to have new proper investigation and reconsider their dismissal for Count VIII.

g. The Court award Ms. Li for her reasonable attorney's fees and costs incurred in connection with this action.

h. The Court awards Ms. Li such further relief as this Court deems just and proper.

PLAINTIFF DEMANDS a trial by jury on all claims to triable.

Respectfully submitted,

YONG LI (Pro Se)

/s/

Date: May 11, 2006

Name: Yong Li

Address: 32 Willow Rd

Sudbury MA 01776

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(2)

NO. 08-909

Supreme Court, U.S.
FILED
FEB 23 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

YONG LI,

Petitioner,

v.

RAYTHEON COMPANY AND OTHERS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MASSACHUSETTS SUPREME JUDICIAL COURT

BRIEF OF RAYTHEON COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: February 23, 2009

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTION PRESENTED

1. Whether the Massachusetts Appeals Court's decision to affirm the dismissal of Petitioner's race discrimination and retaliation claims for failure to state a claim upon which relief can be granted constitutes a decision on an important federal question that conflicts with the decision of another state court of last resort, a United States court of appeals, or the relevant decisions of this Court, or raises an important federal question that has not been, but should be, settled by this Court.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The parties named in the caption, Yong Li and Raytheon Company ("Raytheon"), were not the only parties to the proceedings before the Massachusetts Supreme Judicial Court, Massachusetts Appeals Court, and Massachusetts Superior Court. The Massachusetts Division of Professional Licensure was initially a named defendant but was dismissed from the case at the Superior Court level. Petitioner also indicated that her Petition does not seek Writ of Certiorari as to Arthur Buliung, Ian C. Mitchell, and John Didio, all of whom were defendants in the proceedings before the lower courts. (Pet. at 1 & n.1). Raytheon has no parent companies, and there are no publicly-held companies that own ten percent or more of its stock.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Raytheon Company respectfully opposes the petition for writ of certiorari to review the decision of the Massachusetts Appeals Court.

OPINIONS BELOW

As stated by Petitioner.

JURISDICTION

The Court has jurisdiction to review Petitioner's petition pursuant to 28 U.S.C. § 1257. Petitioner incorrectly cited to 28 U.S.C. § 1254 as the basis for the Court's jurisdiction in her petition.

STATUTES INVOLVED

Respondent contends that only Massachusetts General Laws, Chapter 151B is involved and relevant to the petition.

STATEMENT OF THE CASE

Factual Background.

Respondent contends that Petitioner has ignored her obligations under *Rule 14(1)(g) of the Rules of Supreme Court of the United States* to provide a "concise statement of the case setting out the facts material to consideration of the questions presented" and to "(i) . . . specify the stage in the proceedings below, both in the court of first instance and in the appellate courts, when the federal ques-

tions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . ., so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari." Instead, Petitioner concedes that her "complaint was not adequately written" but that "it is not necessary to list the facts" of her case in the petition (despite the requirements of *Rule 14(1)(g)*) because the petition "has nothing to do with the merit of the case." (Pet. at 4).

Respondent submits that Petitioner's Statement of the Case violates the letter and spirit of *Rule 14(1)(g)*. The question presented in the petition focuses on the lower courts' dismissal of her state race discrimination and retaliation claims for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Massachusetts Rules of Civil Procedure. Thus, Petitioner's recitation of the facts that are material to her claims and, by extension, the Court's consideration of the question presented is essential to a determination of whether the lower courts' judgment constitutes an error that is appropriate for this Court to review on a writ of certiorari.

Pursuant to *Rule 15(2) of the Rules of the Supreme Court of the United States*, Respondent submits that the brief recitation of facts set forth in the decision of the Massachusetts Appeals Court issued on March 25, 2008, (Pet. at 4a-11a), is concise, correct, and sets out the facts material to consideration

of the question presented in the petition. Specifically, Petitioner's racial discrimination claim (brought under Massachusetts General Laws, Chapter 151B) is based upon allegations that Raytheon, in effect, supported misconduct by one of the Company's human resources representatives, Arthur Buliung. (Pet. at 5a). As the Massachusetts Appeals Court observed, Petitioner did not allege in her complaint that Mr. Buliung discriminated against her on the basis of race. (Id.). Petitioner's retaliation claim (also brought under Massachusetts General Laws, Chapter 151B) is centered on her allegations that Raytheon (1) caused her to have a "mental evaluation as a means of reprisal or to control anti-discrimination complaint," and (2) sent her a letter, which she viewed as a threat to terminate her "while she was exercising her right of Family Medical Leave Act (FMLA)." As the Massachusetts Appeals Court noted, Petitioner failed to allege in her complaint the required element that she suffered an "adverse employment action," as defined under state law. (Id.). Finally, as stated above, the petition does not seek the Court's review as to any claims originally brought against defendants-appellees Arthur Buliung, Ian C. Mitchell, and John Didio. (Pet. at 1 & n.1). Therefore, Raytheon Company is the only respondent for purposes of the Court's consideration of the petition.

Proceedings Below.

Respondent agrees with the major points set forth in Petitioner's description of the Proceedings Below. Respondent, however, objects to certain argumentative statements made therein. Therefore, for clarity of the record and convenience of the

Court, Respondent provides its own statement of the Proceedings Below.

On May 11, 2006, Petitioner filed an eight-count complaint in Massachusetts Superior Court. In the complaint, Petitioner asserted, among other claims, a race discrimination claim against Raytheon (Count I); a retaliation claim against the Raytheon, Ian C. Mitchell, and Arthur Buliung (Count II); a claim for violation of the Massachusetts Civil Rights Act (violation of First Amendment rights) against Raytheon (Count III); a claim for violation of the Massachusetts Civil Rights Act (violation of Fifth Amendment rights) against Raytheon and John Didio (Count IV); a negligent/reckless/intentional infliction of emotional distress claim against Raytheon, Mr. Buliung, and Mr. Didio (Count V); a misrepresentation claim against Mr. Buliung (Count VI); and a claim for tortious interference with advantageous [business] relations against Raytheon, Mr. Mitchell, and Mr. Buliung (Count VII). (Pet. at 14a-32a).

On June 23, 2006, Raytheon, among other defendants, filed a Motion to Dismiss all claims against the Company. (Pet. at 5). On October 10, 2006, Petitioner filed a Motion to Amend Complaint, in which she proposed to add Scott Oglesby, Stephanie Kolenski, and Irving Kooris as defendants, and proposed new claims, including violation of "right of privacy" against Raytheon (Count IX), violation of "right of consent" against Raytheon and Mr. Buliung (Count X), violation of the Massachusetts Civil Rights Act against Raytheon and Mr. Buliung (Count XI), and a negligence claim against Raytheon (Count XII). Petitioner also sought to add Ms. Kolenski to her mis-

representation count (Count VI), and to add Mr. Oglesby to her tortious interference count (Count VII). (Pet. at 5).

On October 11, 2006, the Superior Court granted the defendants' Motion to Dismiss in its entirety but agreed to consider Petitioner's Motion to Amend Complaint. (*Id.*) Upon review of Petitioner's Motion to Amend Complaint and the defendants' Opposition, the Court denied Petitioner's Motion on November 6, 2006, and entered Final Judgment in favor of all defendants on all claims in this case on November 7, 2006. (Pet. at 1a).

Petitioner filed a Notice of Appeal from the Final Judgment, as well as from the Superior Court's denial of her Motion to Amend Complaint, on November 21, 2006. (Pet. at 5). On March 25, 2008, the Massachusetts Appeals Court issued its decision, affirming the Superior Court's orders to dismiss the case against all defendants and to deny Petitioner's Motion to Amend Complaint. (Pet. at 3a-11a). In its decision, the Appeals Court affirmed the Superior Court's decision with respect to Counts III, IV, VI, and VIII of the complaint because Petitioner failed to challenge the dismissal of these counts and, thereby, waived the claims. The Appeals Court affirmed the Superior Court's dismissal of the remaining claims (Counts I, II, V, and VII) pursuant to Mass.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted. Finally, as to Petitioner's appeal of the Superior Court's denial of her Motion to Amend Complaint, the Appeals Court found that Petitioner "failed to meet her burden of demonstrating error in [the Superior] Court's ruling." (Pet. at 10a-11a).

On May 21, 2008, Petitioner filed an Application for Further Appellate Review of the case with the Massachusetts Supreme Judicial Court. (Pet. at 7). Respondent opposed the Application on June 23, 2008. Petitioner's Application was denied on July 23, 2008. (Pet. at 12a). Petitioner filed a Petition to Reconsider the Court's Denial of her Application for Further Appellate Review on August 13, 2008. The Court denied Petitioner's Petition on September 8, 2008. (Pet. at 13a). Further, the relevant decisions and orders below were not reported.

Petitioner's petition concerns only her race discrimination (Count I) and retaliation (Count II) claims under state law against Raytheon. (Pet. at 1).

REASONS FOR DENYING THE PETITION

I. THE PETITION SHOULD BE DENIED BECAUSE THE MASSACHUSETTS APPEALS COURT'S DECISION DOES NOT RAISE AN IMPORTANT FEDERAL QUESTION.

The petition should be denied because it does not implicate any of the compelling reasons cited by the Court in *Rule 10 of the Rules of Supreme Court of the United States* to grant a writ of certiorari, such as a conflict regarding an important federal question. Specifically, the question presented in the petition is based on the false premise that the Massachusetts Appeals Court's decision to affirm the dismissal of Petitioner's complaint on grounds that were valid but different than those relied on by the Massachusetts Superior Court is "unprecedent[ed] in U.S. history" and conflicts with the "authoritative decisions" of several United States courts of appeals and other state courts of last resort on the "same issue." (Pet. at 9-10). Despite Petitioner's apparent attempt to frame the question presented as one that implicates a federal question, the question actually presented in the petition concerns only the application of the Massachusetts Rules of Civil Procedure to the particular facts of Petitioner's case, which was brought under state law in state court. Hence, Petitioner's appeal was properly considered and decided by the Massachusetts Appeals Court, and the Massachusetts Supreme Judicial Court refused to reconsider said decision on Petitioner's Application for Further Appellate Review. Because the question presented in the petition seeks review of a state de-

cision that analyzed the application of state-specific court procedural rules, however, the petition does not present this Court with a decision on an important *federal* question that conflicts with the decision of another state court of last resort, a United States court of appeals, the relevant decisions of this Court, or raise an important federal question that has not been, but should be, settled by this Court. *See Rule 10 of the Rules of Supreme Court of the United States.* Therefore, the petition should be denied.

II. THE PETITION SHOULD BE DENIED BECAUSE THE MASSACHUSETTS APPEALS COURT'S DECISION IS CONSISTENT WITH MASSACHUSETTS PRECEDENT AND A SIMILAR LONGSTANDING RULE OF THIS COURT CONCERNING APPELLATE REVIEW OF DISMISSAL ORDERS AND DECISIONS.

Assuming *arguendo* that the question presented in the petition is of the character considered by the Court under *Rule 10*, the decision of the Massachusetts Appeals Court is consistent with applicable Massachusetts appellate case law and, more generally, a similar longstanding rule of this Court regarding appellate review of trial court dismissal orders and decisions. In response to Raytheon's Motion to Dismiss, the Massachusetts Superior Court relied on Rule 12(b)(9) of the Massachusetts Rules of Civil Procedure to dismiss Petitioner's race discrimination and retaliation claims against Raytheon based upon the "[p]endency of a prior action in a court of the Commonwealth." (Pet. at 6a). The Massachusetts Appeals Court found that the Superior Court erred in relying on Rule 12(b)(9) to dismiss Pe-

titioner's race discrimination and retaliation claims against Raytheon. (Id.). The Appeals Court nonetheless affirmed the dismissal of the claims on the alternative, valid ground that with respect to both claims, Petitioner failed to state a claim upon which relief can be granted. *See Rule 12(b)(6) of the Massachusetts Rules of Civil Procedure;* (Pet at 7a-8a). Specifically, as to Petitioner's race discrimination claim, the Court found that Petitioner did not allege in her complaint that Mr. Buliung discriminated against her on the basis of race. (Pet. at 8a). As to Petitioner's retaliation claim, the Appeals Court found that Petitioner failed to allege in her complaint the required element that she suffered an "adverse employment action," as defined under state law. (Id.).

Petitioner argues that the Massachusetts Appeals Court's alleged "sua sponte" decision to affirm the Superior Court's ruling under Rule 12(b)(6) (as opposed to affirming on grounds relied on by the Superior Court) "is unprecedented in US history." (Pet. at 11). Contrary to Petitioner's argument, the Massachusetts Appeals Court's decision is consistent with relevant Massachusetts precedent, which permits appellate courts to affirm dismissal orders and decisions on grounds different than those relied upon by the trial court. Specifically, the Massachusetts Supreme Judicial Court has stated that the granting of a dispositive motion should be upheld "if there is any valid ground on which the motion should have been granted," whether or not the valid ground was relied on by the trial court. *Alholm v. Town of Wareham, 358 N.E.2d 788, 791 (Mass. 1976). See also St. Germaine v. Pendergast, 584 N.E.2d 611,*

614 & n. 9 (Mass. 1992)(any obvious ground, even though not raised in the trial court, can be appropriately used to uphold the judge's grant of summary judgment). This Massachusetts rule of appellate review is consistent with this Court's longstanding rule that, "in reviewing the decision of a lower court, it must be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason." *Sec. and Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 88 (1943)*(internal citations omitted). According to the Court, "[t]he reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate." *Id.* Based on the foregoing, even if the question presented in the petition is of the character considered by this Court under *Rule 10*, there is no basis to review or overturn the Massachusetts Appeals Court's decision to affirm the dismissal of Petitioner's race discrimination and retaliation claims because the decision is consistent with Massachusetts precedent and a longstanding rule of this Court concerning appellate review of trial court dismissal orders and decisions.

III. THE PETITION SHOULD BE DENIED BECAUSE THE MASSACHUSETTS APPEALS COURT'S DECISION IS CONSISTENT WITH THE DECISIONS OF A MAJORITY OF UNITED STATES COURTS OF APPEAL AND SEVERAL STATE APPELLATE COURTS.

Petitioner asserts that the Massachusetts Appeals Court's "*sua sponte*" dismissal of her race discrimination and retaliation claims for failure to state a claim upon which relief can be granted is "unprecedented in US history . . .," and inconsistent with principles of due process and the adversarial process. (Pet. at 11-15). Petitioner's assertions are incorrect. The Massachusetts Appeals Court's decision to dismiss Petitioner's race discrimination and retaliation claims on its own initiative under Mass.R.Civ.P. 12(b)(6) is consistent with decisions of a majority of United States courts of appeals interpreting the analogous Rule 12(b)(6) of the Federal Rules of Civil Procedure and several state appellate courts.

Specifically, a court "may dismiss a claim *sua sponte* under Fed.R.Civ.P. 12(b)(6) . . .. Such a dismissal may be made without notice where the claimant cannot possibly win relief." *Omar v. Sea-Land Service, Inc., 813 F.2d 986, 991 (9th Cir. 1987)* (internal citations omitted); *see, e.g., Gonzalez-Gonzalez v. United States, 257 F.3d 31, 37 (1st Cir. 2001)*("If it is crystal clear that the plaintiff cannot prevail and that amending the complaint would be futile, then a *sua sponte* dismissal [without notice] may stand . . . "); *Leonhard v. United States, 633 F.2d 599, 609 &*

n.11 (2d Cir. 1980)(the district court has the power to dismiss a complaint *sua sponte* for failure to state a claim); *Bryson v. Brand Insulations, Inc., 621 F.2d 556, 559 (3d Cir. 1980)*(the district court may on its own initiative enter an order dismissing the action provided that the complaint affords a sufficient basis for the court's action); *First Gibraltar Bank, FSB v. Smith, 62 F.3d 133, 135 (5th Cir. 1995)(sua sponte* dismissal of meritless counterclaim under Rule 12(b)(6) permitted even though defendant did not file motion to dismiss for failure to state a claim for relief); *Hoskins v. Poelstra, 320 F.3d 761, 763 (7th Cir. 2003)*(judges have ample authority to dismiss frivolous or transparently defective suits spontaneously under Fed.R.Civ.P. 12(b)(6), and "thus save everyone time and legal expense"); *Smith v. Boyd, 945 F.2d 1041, 1042-43 (8th Cir. 1991)*(district court *sua sponte* may dismiss complaint under Rule 12(b)(6) so long as dismissal does not precede service of process; although district court should provide pre-dismissal notice, failure to give plaintiff notice and opportunity to respond does not mandate reversal if it is patently obvious that plaintiff could not prevail based on facts alleged in complaint); *McKinney v. Oklahoma, 925 F.2d 363, 365 (10th Cir. 1991)* (although preferred practice is to accord plaintiff notice and opportunity to amend complaint before acting upon motion to dismiss for failure to state a claim, *sua sponte* dismissal under Rule 12(b)(6) is not reversible error when it is patently obvious that plaintiff could not prevail on the facts alleged and allowing opportunity to amend complaint would be futile); *Best v. Kelly, 39 F.3d 328, 331 (D.C.Cir. 1994)*(complaint may be dismissed, *sua sponte* if need be, under Rule 12(b)(6) wherever "the plaintiff cannot possibly win relief").

See also 5A C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1357 at 301 (2d ed. 1990)(federal district court may dismiss meritless claims *sua sponte* under Fed.R.Civ.P. 12(b)(6)). This Court has not passed judgment on the permissible scope of *sua sponte* dismissals under Fed.R.Civ.P. 12(b)(6). *See Neitzke v. Williams, 490 U.S. 319, 329 & n. 8 (1989).*

Several state appellate courts have followed the majority of United States courts of appeals and held that *sua sponte* dismissal of a complaint is warranted where the claimant cannot prevail on the facts alleged in the complaint. *See, e.g., State ex rel. Scott v. Cleveland, 859 N.E.2d 923, 926 (Ohio 2006)*(*sua sponte* dismissal of claim without notice is permissible under Rule 12(b)(6) where claimant cannot possibly prevail on the facts alleged in the complaint); *Harper v. Clarke, 713 N.W.2d 502, 506-07 (Neb.App. 2006)*(same); *Albrecht v. First Federal Sav. and Loan Ass'n of Grand Forks and Minot, 372 N.W.2d 893, 894-895 (N.D. 1985)*(same).

The common theme among all of the above referenced cases in which *sua sponte* dismissal (for failure to state a claim upon which relief can be granted) has been upheld is the court's finding that it is *obvious* that the claimant has failed to allege facts that could possibly entitle her to relief. This common theme is evident in the Massachusetts Appeals Court's decision to affirm the dismissal of Petitioner's race discrimination and retaliation claims. Specifically, as the Massachusetts Appeals Court noted, Petitioner cannot possibly prevail on her race discrimination claim because she did not allege that

the Company or its agents discriminated against her *on the basis of race.* (Pet. at 8a). Similarly, Petitioner cannot prevail on her retaliation claim because she failed to allege that she suffered an adverse employment action, which is a required element of her *prima facie* case of retaliation under Massachusetts law. *See Tate v. Department of Mental Health, 645 N.E.2d 1159, 1165 (Mass. 1995); MacCormack v. Boston Edison Co., 672 N E.2d 1, 7-8 (Mass. 1996).* Therefore, consistent with the above referenced federal and state case law, the Massachusetts Appeals Court properly dismissed Petitioner's race discrimination and retaliation claims under Mass.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted.

Finally, Petitioner was accorded due process and permitted to participate in the "adversarial process" in the Massachusetts courts -- her case was considered by the Massachusetts Superior Court, the Massachusetts Appeals Court twice (on appeal and Petitioner's Petition for Rehearing), and the Massachusetts Supreme Judicial Court twice (on Petitioner's Application for Further Appellate Review and her Petition to Reconsider the Court's denial of her Application for Further Appellate Review). (Pet. at 2-3).

Based on the foregoing, there is no conflict between the Massachusetts Appeal Court's decision and that of a United States court of appeals, state court of last resort or this Court on an important federal question that is appropriate for review and, accordingly, Petitioner's petition should be denied as to the question presented.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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